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CC Docket No. 98-146

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

OCT 14 1998

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	
Advanced Telecommunications)	CC Docket No. 98-146
Capability to All Americans in a)	
Reasonable and Timely Fashion, and)	
Possible Steps to Accelerate Such)	
Deployment Pursuant to Section 706 of)	
the Telecommunications Act of 1996)	

REPLY COMMENTS OF AMERICA ONLINE, INC.

America Online, Inc. ("AOL") hereby files its reply to comments received in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Inquiry in the above-captioned docket.¹ As the record demonstrates, the deployment of broadband transmission capabilities, by both cable operators and local exchange carriers ("LECs"), will make possible high-speed Internet services that can richly enhance and expand consumers' online experience. AOL submits that the Commission can best secure the manifest benefits of broadband technology for the American public by acting promptly to ensure open and non-discriminatory access to all last-mile broadband facilities.

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 98-187 (rel. Aug. 7, 1998) (Notice of Inquiry) ("NOI"). All comments cited herein were filed in CC Docket No. 98-146 on September 14, 1998.

I. INTRODUCTION AND SUMMARY

The record demonstrates that broadband last-mile infrastructures promise exciting new capabilities that may transform the provision of Internet and online services. Cable provider and telephone company commenters alike vividly describe their respective infrastructures' potential to deliver profound benefits to the American public – including consumers, businesses, schools, libraries and health care providers – and to the economy at large. Their filings detail the advantages inherent in the high-speed, “always on” capabilities of broadband facilities and the new applications they will enable. As such, these offerings have the potential to change not only the “look and feel” but also the utility of the Internet for businesses and consumers.² AOL supports the Commission's efforts to ensure that these and other advanced communications capabilities are promptly deployed and adopted by American consumers.

To this end, AOL reiterates that broadband deployment will be promoted most effectively by ensuring open access to last-mile transport facilities, including both incumbent LEC and cable broadband infrastructures. Such access will promote consumer choice in Internet services, lead to continued innovation and investment in products and services provided over the Internet, and facilitate full and effective loop-to-loop competition between cable operators and LECs. This competition, in turn, will enable the Commission to pursue an overall reduction in the level of regulation, as intended by Congress in the Telecommunications Act of 1996. At the same time, however, the Commission should recognize the fundamental distinction between the market dysfunctionality in the underlying broadband infrastructures upon which the Internet marketplace

² See generally BellSouth Comments at 10, 33-34; National Cable Television Association (NCTA) Comments at 12-13; U S West Comments at 4.

rests and the open and competitive environment of the Internet, and thus continue the wise, and mandated, policy of not regulating the Internet marketplace itself.³

II. THE RECORD ESTABLISHES THAT THE PUBLIC WILL BENEFIT FROM OPENNESS AND CONSUMER CHOICE IN BROADBAND INFRASTRUCTURES

As AOL explained in its opening comments, the profound public interest benefits associated with the growth of the Internet in the narrowband environment are, in large part, the result of an open underlying infrastructure.⁴ The ubiquitous, “open” availability to ISPs and their subscribers of traditional telephone services has created a competitive Internet marketplace that encourages innovation and delivers consumer choice, affordable pricing and other consumer benefits. This success should be the model that guides the Commission as it considers the issues presented in this docket. As PSINet succinctly states, the “highly competitive Internet market exemplifies the conditions for innovation that are the goal of Section 706.”⁵

³ See 47 U.S.C. sec. 230(b) (expressing Congress’ mandate to “preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State Regulation.”). The Retail ISPs share this concern, noting that “all that [is] want[ed] from regulators such as the Commission is the preservation of a regime in which competition for end users – on the basis of price, service, and features – can continue, with high bandwidth access added to the mix.” Retail ISPs Comments at 6.

⁴ See AOL Comments at 3.

⁵ PSINet, Inc. Comments at 9.

A. Commenters Clearly Identify the Openness of the Underlying Infrastructure as Critical to the Robust Competition Which Has Enabled the Internet To Flourish

A wide range of commenters -- from public interest entities such as the Center for Media Education ("CME"), Minority Media and Telecommunications Council, and the Consumer Federation of America, to retail entities such as Circuit City -- agree that the open infrastructure of narrowband networks has engendered innovation and consumer choice.⁶ MindSpring, for example, explains that ISPs offer "different pricing, different network reliability, and different levels of support" to win customers, which enables customers to "choose an ISP that provides them with the (non-last mile) network services that they value and are willing to pay for."⁷ Accordingly, as these and other parties point out, American consumers have enjoyed a wealth of new Internet services, while the price of such services has fallen.⁸

Consumers' ability to choose their Internet service provider likewise has encouraged market entry by new providers who can specialize in a particular industry and develop "niche" products and services, permitting consumers to choose products that most precisely meet their needs.⁹ Small businesses, for instance, are able to use the Internet by purchasing Internet access from an ISP who also will provide individualized installation, employee training, web site design, and industry-specific subject matter expertise.¹⁰ Similarly, "local governments, schools and libraries" can purchase Internet access with "technical support and training, sometimes through reduced-charge

⁶ See, e.g., CME, *et al.* at 12; Circuit City Stores, Inc. Comments at 12-13.

⁷ MindSpring Enterprises, Inc. (Mindspring) Comments at 13-14.

⁸ See Retail ISPs Comments at 4; ISP Consortium Comments at 14-15; CIX Comments at 9-10.

⁹ See MindSpring Comments at 13-16; Retail ISPs Comments at 1-5; ISP Consortium Comments at 14-15.

¹⁰ ISP Consortium Comments at 2.

accounts,” and the elderly, youth, and other “late entrants” to the Internet can take advantage of the “classes, software, and texts” offered by independent ISPs.¹¹ In sum, consumers can choose a provider that offers them their preferred combination of price, quality and functionality.¹²

Moreover, as the record amply describes, a multiplicity of consumer choices also enhances information diversity.¹³ This diversity is particularly important, given that, as the Center for Media Education *et al.* explains, “Internet users are not only subscribers, but also citizens using the Internet to receive information about political issues, government-distributed” information, and local matters.¹⁴ It follows that, as Americans increasingly look to the Internet as a primary source of information, the Commission “must preserve the current status of the Internet as an environment for free expression and civic discourse,”¹⁵ and customers must continue to be able to “choose among dozens of companies who compete in part based on how they organize, search, filter, and present Internet content.”¹⁶

MindSpring correctly explains that the “challenge for the Commission is to preserve the benefits of [today’s] ‘Open System World’ as new broadband, high speed packet-switched local connections are deployed to the nation’s homes and offices.”¹⁷ PSINet likewise underscores the need to “endeavor to make the local loop for advanced telecommunications as open and accessible as the

¹¹ *Id.*

¹² See MindSpring Comments at 13-14.

¹³ See *id.* at 4.

¹⁴ CME, *et al.* Comments at 11-12.

¹⁵ *Id.*

¹⁶ MindSpring Comments at 4.

¹⁷ *Id.* at i.

Internet is today.”¹⁸ Simply put: “First, consumers should be able to select any ISP they want Second, to ensure that consumers have viable choices among ISPs, the market for transport services to the competing ISPs should be open to competition.”¹⁹ While a marketplace solution ensuring openness and competition would be preferred, the Commission, under its broad public interest mandate, has the power to address the collusive exercise of incumbent cable operators’ entrenched market positions to favor their own affiliate’s operations. And because of the critical nature of this issue, the time to exercise that power is now.

B. The Establishment of an Open and Competitive Market for the Delivery of Internet Services Over Broadband Will Promote the Deployment of Advanced Telecommunications Services.

AOL strongly agrees with the Retail ISPs that “preservation of competitive conditions in the market[place] for high-speed Internet access has a critical role to play in . . . promot[ing] the deployment of advanced telecommunications capability . . . in fulfillment of the mandate of Section 706.”²⁰ In making possible the numerous consumer benefits described above, competition inevitably will increase demand for high-speed access to the Internet. This increased consumer demand is, in turn, the predominant incentive motivating companies to invest in broadband infrastructure.²¹

The Commercial Internet Exchange Association (“CIX”) and Information Technology Association of America (“ITAA”) echo AOL’s concern that consumer choice will be crucial to

¹⁸ PSINet Comments at 9. *See generally* ISP Consortium Comments at 7-13; MindSpring Comments at 26-32.

¹⁹ CIX Comments at 17-18.

²⁰ Retail ISPs Comments at 2.

²¹ *See, e.g.*, Retail ISPs Comments at 2.

building consumer demand for broadband services and, therefore, to the deployment of broadband facilities.²² As ITAA observes, “experience in numerous other contexts has conclusively demonstrated that allowing users to select from among multiple providers creates incentives for providers to improve the quality of their services, provide consumers with expanded offerings, develop innovative new technologies, and offer services at lower prices.”²³ MindSpring similarly explains that “the purpose of Section 706 is to create an environment in which end users (not last mile loop owners) can decide for themselves what applications and what vendors they will access over the next generation telecommunications network.”²⁴ Thus, consumers should not be required to purchase bundled Internet access and content offerings owned by the loop owner to reach the Internet service of their choice. Plainly, requiring a consumer to pay twice to reach their preferred ISP will create an enormous disincentive for consumers to purchase broadband access arrangements and is not in the public interest.

For similar reasons, the Commission should reject the objections of NCTA and other cable interests that requiring open access to cable infrastructures “would reduce rather than enhance the incentives for investment in broadband infrastructure.”²⁵ Contrary to these assertions, an obligation to be “open” for business to independent ISP’s would neither eliminate an operator’s ability to offer bundled transport and other services to the extent they are sought by consumers, nor dictate to operators how and under what terms such services are provided. Nor would it prevent the operator’s

²² See CIX Comments at 17 (“ensuring ISP choice for the American consumer is a critical goal for the deployment of ATC in this country”); AOL Comments at 10.

²³ ITAA Comments at 12.

²⁴ MindSpring Comments at 6.

²⁵ See NCTA Comments at 2; *see also* Comcast Comments at 14-17.

ability to recover costs.²⁶ Rather, a general policy of openness and competitive access would be analogous to existing policies that operate to ensure that cable operators cannot use their bottleneck facilities to disadvantage non-affiliated providers.²⁷ More broadly, the Commission should not view the issue of "investment incentives" narrowly -- the public interest requires an examination of all public interest benefits, including those that flow from an open infrastructure. In so doing, it is clear that public interest benefits of full and effective loop-to-loop competition as discussed below, and a fully robust and competitive Internet services marketplace, outweigh any speculative claims of investment disincentives.

As MindSpring correctly notes, the Commission should "firmly reject any suggestion that the FCC must reward broadband loop owners with dominant market power as an incentive to encourage investment."²⁸ In addition, as Circuit City explains, "permitting access to competing providers of Internet service over the new, high-speed HFC cable facilities . . . will speed the deployment of advanced telecommunications services . . . [M]ore entrants will contribute to the construction of the necessary facilities to provide these services, thereby creating demand and speeding the nationwide

²⁶ Providers would still pay for access, allowing the operators to realize a return on their investment. *See* Circuit City Comments at 12 ("Requiring competitive access to broadband cable networks would permit cable companies to recover many of their investment costs from competitive access providers that lease capacity on their networks."). Moreover, cable operators' investments in broadband infrastructure are made for a number of competitive reasons other than the ability to deliver high-speed Internet access -- most notably the desire to offer phone and video on demand -- and, thus, it would be inaccurate to assign this investment exclusively or even substantially to the need to prepare for offering high-speed Internet access.

²⁷ For instance, the Commission has issued "commercial availability" rules, 47 C.F.R. § 76.1200 *et seq.* (requiring that converter boxes, interactive communications equipment, and other equipment used to access multichannel video programming be made "commercially available" through the use of separate system security or conditional access elements and eventual restriction on the offering of devices with integrated security elements), "carriage agreement" rules, 47 C.F.R. § 76.1300, *et seq.*, (prohibiting cable operators from requiring satellite and other programmers to grant ownership interests or exclusive distribution rights in exchange for carriage on their systems), and "program access" rules, 47 C.F.R. § 76.1000 *et seq.*, (prohibiting vertically-integrated programmers from discriminating against the competitors of cable operators and precluding exclusive distribution contracts between cable operators and vertically-integrated program services) to ensure that competitors can compete with cable on fair terms, despite the cable industry's investment of private capital.

²⁸ Mindspring Comments at 8.

deployment of these services.”²⁹ AOL agrees and maintains that there is no public interest basis to support the argument that gatekeeper status and an ability to capture supranormal profits are a necessary prerequisite to encourage investment in broadband infrastructure by cable operators.

C. Policies That Promote Open Cable Networks Will Facilitate Full and Effective Loop-To-Loop Competition

Beyond the direct benefits of broadband Internet access to consumers, AOL explained in its opening comments that an open cable broadband infrastructure will enhance competition in and among last-mile loop providers.³⁰ In an environment with full and effective “loop-to-loop” competition, market forces will permit ISPs to choose among telephone company and cable operator facilities based upon the relative price, performance and features offered by each. This type of facilities-based competition, a fundamental objective of the 1996 Telecommunications Act, will further stimulate the development of data-friendly networks. Equally important, the development of actual “loop-to-loop” competition can provide the Commission with the opportunity to transition toward a more market-driven and less regulatory role, including steps to reduce and ultimately phase-out the extensive regulatory scheme now imposed on incumbent LECs.

AOL submits that an overarching policy of openness access is an effective means to bring about such intermodal competition. Protection of consumer choice among last mile providers will create incentives for those providers to respond to market signals from both ISPs and end users. In turn, the marketplace rather than the differences in regulatory treatment will determine winners and losers in the delivery of Internet services, and the public will be the ultimate beneficiary.

²⁹ Circuit City Comments at 12.

³⁰ AOL Comments at 11.

III. CONCLUSION

The record makes clear the potential benefits that broadband services can deliver to consumers if they are deployed in the open fashion that has characterized today's narrowband environment. The Commission should, therefore, take every opportunity to ensure that the public interest benefits of broadband networks are indeed realized by the American public and that consumer choice in the delivery of cable and telephony-delivered broadband infrastructures flourishes. To this end, the Commission should establish a general policy requiring open and competitive access to all last-mile wireline facilities.

Respectfully submitted,



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